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No. 89-1894

In The

Supreme Court of the United States

OCTOBER TERM, 1989

CEFERINO COLOMA,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS AND CHEVRON SHIPPING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT CHEVRON SHIPPING COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether a person employed as a cook and messman serving crews of ships and other persons at a mess hall on a wharf, but who had no involvement with the loading and unloading of vessels, or the construction or repair of vessels, was engaged in "maritime employment" within the meaning of section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (1982 ed., and Supp. V).

RULE 29.1 LISTING

Respondent Chevron Shipping Company has a parent company, Chevron Corporation. Respondent Chevron Shipping Company has no subsidiaries.

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Ceferino Coloma,

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Director, Office Of Workers' Compensation Programs and Chevron Shipping Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT CHEVRON SHIPPING COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A14) is reported at 897 F.2d 394. The order of the Benefits Review Board denying reconsideration (Pet. App. A15-A17) is reported at 21 Ben.Rev.Bd.Serv. (MB) 318. The initial decision and order of the Benefits Review Board (Pet. App. A18-A23) is reported at 21 Ben.Rev.Bd.Serv. (MB) 200. The order denying reconsideration by the administrative law judge (Pet. App. A24) is not reported.

The administrative law judge's decision and order denying benefits (Pet. App. A25-A30) is reported at 18 Ben.Rev.Bd.Serv. (MB) 434 (ALJ).

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1990. The petition for a writ of certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner, Ceferino Coloma, was employed by respondent, Chevron Shipping Company (Chevron Shipping), as a messman and cook at a mess hall operated by Chevron Shipping on a wharf. The primary function of the mess hall, known as the "Seagull Inn", was to provide meals to the officers and seamen of visiting tankers while their shipboard stewards took shore leave. Pet. App. A28. The Seagull Inn also served crews of Chevron harbor tugs and barges, and other visitors, including Coast Guard officers, customs officials, harbor pilots and outside contractors. *Id.* Coloma's work at the Seagull Inn involved cleaning tables, washing dishes and cooking. Pet. App. A29. Coloma's employment did not involve any aspect of the process of loading, unloading, repairing or building vessels. Pet. App. A30.

2. Respondent Chevron Shipping notes that petitioner's statement of facts (Pet. 5-6) includes factual assertions that are not material herein or that are not

supported in the record, as follows: (1) Coloma's employments by another employer, Chevron U.S.A. Inc., aboard vessels before and after his employment by respondent Chevron Shipping are not material to this case; (2) The record does not establish that the operation of a mess hall on the wharf for seamen to eat while off a vessel was necessitated by a Coast Guard regulation requiring members of the crew to remain aboard the vessel during cargo handling. After the Seagull Inn was closed in 1982, the crews ate aboard ship or at a cafeteria located about a mile away. Pet. App. A13.

3. Coloma filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. §§ 901-950 (1982 ed., and Supp. V) for benefits on account of an injury sustained in the course of his employment during the years 1974 to 1982. Pet. App. A25-A26. Chevron Shipping disputed the claim. *Id.* At a formal hearing before Administrative Law Judge (ALJ) Karst, the parties stipulated that the claimed injury, benign keratoma and lichnoid dermatitis of both hands, arose out of and in the course of Coloma's employment with Chevron Shipping and that the injury occurred on a "maritime situs". *Id.* The ALJ determined that Coloma was not entitled to LHWCA benefits, finding that he was not a "maritime employee" within the meaning of section 2(3) of the Act, 33 U.S.C. 902(3), because his occupation "had no connection with loading or unloading of ships, moving cargo between ships and land transportation, or ships construction or repair." Pet. App. A30. Coloma's motion for reconsideration was denied. Pet. App. A24.

4. Coloma appealed to the Benefits Review Board pursuant to 33 U.S.C. § 921(b), arguing that his work had

a significant relationship to maritime transportation and that the ALJ relied on dicta in this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). The Board affirmed the ALJ's decision and order and order denying reconsideration. Pet. App. A18. The Board concluded that Coloma was not engaged in maritime employment because his work had no connection with the loading and unloading of ships and his work was not done in furtherance of traditional maritime activity. Pet. App. A22. Coloma moved for reconsideration and the Board denied the motion. Pet. App. A15.

5. Coloma appealed to the Court of Appeals pursuant to 33 U.S.C. § 921(c). The Court of Appeals affirmed the decision of the Board. Pet. App. A1. The Court of Appeals concluded that Coloma had not been engaged in "maritime employment", that the definition of maritime employment applied in *Herb's Welding* was not dicta and that Coloma's functions were not essential to the longshoring operations of Chevron Shipping. Pet. App. A1.

SUMMARY OF ARGUMENT

The Court of Appeals correctly applied the standard articulated by this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989). Petitioner's employment did not involve any aspect of the process of loading, unloading, building or repairing vessels. Thus, it was correctly determined that he was not "engaged in maritime employment" within the meaning of section 2(3) of the LHWCA, 33 U.S.C. § 902(3).

The "realistically significant relationship to traditional maritime employment" test, which petitioner contends should have been applied to determine whether he was engaged in maritime employment under section 2(3), was rejected by this Court in its decisions in *Herb's Welding* and *Chesapeake And Ohio Ry. Co.* The decision below does not create any real conflict with the decision of another court of appeals.

Accordingly, this case does not warrant further review.

ARGUMENT

A PERSON EMPLOYED AS A MESSMAN AND COOK AT A MESS HALL LOCATED ON A WHARF AND WHO HAS NO INVOLVEMENT IN THE LOADING, UNLOADING, BUILDING OR REPAIR OF VESSELS IS NOT COVERED UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

The Court of Appeals correctly concluded that petitioner Coloma, a messman and cook, who was injured while employed at a mess hall located on a wharf but who had no involvement with the loading, unloading, building or repair of vessels, was not covered by the LHWCA. In order for the LHWCA to apply to Coloma, he must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include ___" (certain enumerated categories of employees). 33 U.S.C. § 902(3)(1982 ed., and Supp. V). In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 (1985), this Court stated that "the 'maritime employment'

requirement is 'an occupational test that focuses on loading and unloading.' " (quoting its decision in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979)). "Its [Congress'] purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. . . . " *Id.*, at 423. "[L]and-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381, 384 (1989). Since it was found that Coloma's duties of cleaning tables, washing dishes and cooking did not involve "any aspect of the process of loading, unloading, repairing or building vessels" (Pet. App. A30), it was correctly concluded that Coloma was not engaged in maritime employment.

THE COURT OF APPEALS' DECISION IN ACCORDANCE WITH THIS COURT'S DECISION IN *HERB'S WELDING*, IN WHICH THE "REALISTICALLY SIGNIFICANT RELATIONSHIP" TEST FOR DETERMINING MARITIME EMPLOYMENT WAS REJECTED, DOES NOT PROVIDE A REASON FOR REVIEW BY THIS COURT.

Petitioner argues (Pet. 7-14) that this Court should consider whether the "realistically significant relationship" test articulated in *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) should be applied to determine whether a person is engaged in maritime employment. In *Weyerhaeuser*, the Court of Appeals for the Ninth Circuit held that the occupational test under section 902(3) requires that the employee's job "have a realistically significant relationship to 'traditional maritime activity. . . . ' " *Id.*, at 961

(citation omitted). This Court rejected that test in its decisions in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989). In *Herb's Welding*, the Court of Appeals for the Fifth Circuit had held that the employee's work bore "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters." *Herb's Welding v. Gray*, 703 F.2d 176, 179-180 (5th Cir. 1983). This Court reversed, rejecting the "Fifth Circuit's expansive view of maritime employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985). In *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989), this Court reversed the Supreme Court of Virginia which had adopted the "realistically significant relationship" test. "In the course of considerable litigation, including several cases in this Court, it has been clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Id.*, at 384.

Petitioner's reliance (Pet. 4, 8, 11, 12) on *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972) in support of the "realistically significant relationship" test employed in *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) is inapposite. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 320 n. 29 (1983), this Court noted that *Executive Jet*, which involved the application of federal admiralty tort jurisdiction to an airplane crash into navigable waters, was not relevant to determination of LHWCA coverage.

The decisions of the Courts of Appeals for the Eleventh and Fifth Circuits, to which petitioner refers (Pet. 8-9), are not in conflict with the decision below. In *Sanders v. Alabama Dry Dock And Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir. 1988), the Court of Appeals for the Eleventh Circuit relied on *Odom Const. Co. v. U. S. Dept. of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), a pre-*Herb's Welding* decision, in applying the "realistically significant relationship" test. The Eleventh Circuit's reliance on pre-*Herb's Welding* authority without reference to this Court's decision in *Herb's Welding* does not represent a clear conflict with the Ninth Circuit's decision below. The Fifth Circuit's decision in *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990), which involved a choice of contract law question under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331-56 (1986 ed., and Supp. III 1989), is not in conflict with the decision below because petitioner's reference is to dictum and in its opinion, the Fifth Circuit acknowledged this Court's criticism of the Fifth Circuit's "expansive view of maritime employment." *Id.*, at 1049.

Petitioner contends (Pet. 12-14) that the standard applied in *Herb's Welding* limits maritime employment to "four narrow categories", and that it is in conflict with this Court's statement in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78 n. 7 (1979) indicating that the occupations included within the meaning of "maritime employment" are not limited to those mentioned in § 902(3). The decisions are not in conflict. It was acknowledged in *Herb's Welding* and *Chesapeake And Ohio Ry. Co.* that the listed occupations were not exclusive. *Herb's Welding, Inc. v.*

Gray, 470 U.S. 414, 423 n. 9 (1985), *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381, 384 (1989).

In urging this Court to abandon its prior decisions and adopt a view of "maritime employment" which would include activity that is not an integral or essential part of loading or unloading a vessel, petitioner disregards this Court's observation that "Congress did not seek to cover all those who breathe salt air." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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